1988

The State of Utah v. Jerry Lee Velarde : Brief of Appellant

Utah Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
JERRY LEE VELARDE,	:	Case No. 880211-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from denial of defendant's Motion to Withdraw Plea of Guilty to Attempted Mayhem, a third degree felony, in violation of Utah Code Ann. §76-5-104 (1953 as amended) and §76-4-102 (1953 as amended). Appellant entered the plea of guilty before the Honorable Jay Banks, Judge, Third Judicial District Court, Salt Lake County, State of Utah on January 24, 1984.

The Honorable Raymond S. Uno, Judge, Third Judicial District Court, Salt Lake County, State of Utah denied appellant's motion to withdraw his guilty plea after hearings held on August 31, 1987; February 8, 1988; and September 12, 1988.

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STATEMENT OF THE ISSUE

Did the trial judge abuse his discretion in denying Mr. Velarde's motion to withdraw his guilty plea?

TEXT OF STATUTE AND CONSTITUTIONAL PROVISION

The fourteenth amendment to the federal constitution provides in pertinent part:

> Section 1.
> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Utah Code Ann. §77-35-11(e) (1982 and Supp. 1986) provides:

> (e) The court . . . shall not accept such a [guilty] plea until the court has made the findings:
>
> (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
>
> (2) That the plea is voluntarily made;
>
> (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
>
> (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
>
> (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
>
> (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same shall be approved by the court. If recommendations as to sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §77-35-26(2)(b) (1953 as amended) and §78-2a-3(2)(e) (1986) whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a conviction and final judgment for any crime other than a first degree or capital felony. Mr. Velarde pled guilty to a third degree felony and thereafter moved to withdraw his guilty plea. The Honorable Raymond S. Uno, Judge, Third District Court, Salt Lake County, State of Utah, denied defendant's motion; this appeal arises from the denial of that motion.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Respondent,	:	
v.	:	
JERRY LEE VELARDE, Defendant/Appellant.	:	Case No. 880211-CA Priority No. 2

STATEMENT OF THE CASE

On January 24, 1984, appellant/defendant JERRY LEE VELARDE pled guilty to Attempted Mayhem, a third degree felony. Mr. Velarde thereafter moved to withdraw his guilty plea. Judge Raymond S. Uno denied that motion after hearings held on August 31, 1987; February 8, 1988; and September 12, 1988. Mr. Velarde appeals the trial court's denial of his motion to withdraw his guilty plea.

STATEMENT OF THE FACTS

On January 24, 1984, Mr. Velarde pled guilty to Attempted Mayhem, a third degree felony (R. 16-18). At the time he entered his plea, he had been convicted of second degree homicide, a first degree felony, and sentenced to serve five years to life at the Utah State Prison (Transcript of Hearing held August 31, 1987, hereinafter TA, at 10).

Although Mr. Velarde had a defense to the charge of Mayhem, he pled guilty because he believed it would have little impact on the amount of time he would serve in prison since he was already serving five years to life on the murder conviction

(TA. 8, 11). On December 4, 1986, the Utah Supreme Court reversed Mr. Velarde's murder conviction and he subsequently pled guilty to Manslaughter (TA. 8).

Thereafter, Mr. Velarde moved to withdraw his plea of guilty to Attempted Mayhem based on his incorrect understanding of the consequences of that plea and the trial judge's failure to comply with Utah Code Ann. §77-35-11(e) and the due process clause of the fourteenth amendment in accepting that plea.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. Velarde's motion to withdraw his guilty plea. The guilty plea was taken in violation of due process and Rule 11(e) of the Rules of Criminal Procedure (1982 and Supp. 1986). Furthermore, the plea was not knowingly, intelligently and voluntarily made since Mr. Velarde did not understand its consequences.

ARGUMENT

POINT: THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. VELARDE'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Utah Code Ann. §77-13-6 (1953 as amended) permits a plea of guilty to be withdrawn upon good cause and with the leave of the court. An appellate court will reverse a trial court's denial of a motion to withdraw a guilty plea "when it clearly appears the trial court has abused its discretion." State v. Vasilacopolus, 756 P.2d

92, 93 (Utah App. 1988) (pet. cert. denied) citing State v. Mildenhall, 747 P.2d 422 (Utah 1987).

A. MR. VELARDE DID NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTER HIS PLEA OF GUILTY TO THE CHARGE OF ATTEMPTED MAYHEM.

Good cause for withdrawal of a guilty plea may be established by demonstrating that the plea was not made knowingly, intelligently and voluntarily. See State v. Gallegos, 738 P.2d 1040, 1041 (Utah 1987). In Gallegos, the Utah Supreme Court reversed the trial court's denial of the defendant's motion to withdraw his guilty plea where the State's witness recanted her preliminary hearing testimony after the defendant entered his guilty plea.

In Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court clarified that the record must establish that a plea of guilty was intelligently and voluntarily made and the trial judge has the responsibility of making an adequate record of the defendant's waiver of his constitutional rights. Where the record does not disclose that the defendant intelligently and voluntarily entered his guilty plea, the due process clause of the fourteenth amendment to the federal constitution is violated.

For a guilty plea to be made knowingly, voluntarily and intelligently, the defendant must understand the nature of the charge against him, the elements of the crime charged, the relationship of the law to the facts, and the possible consequences of the guilty plea. See State v. Gibbons, 740 P.2d 1309 (Utah

1987). In State v. Cutler, 590 P.2d 444 (Ariz. 1979), the Arizona Supreme Court delineated the components of an adequate plea:

> For a plea to be intelligently made, a defendant must thoroughly understand its consequences. Moreover, in order for a plea to be deemed voluntary, the defendant must be aware of its ramifications and must be apprised of the range of sentence that he could face and of the rights he will forfeit. Therefore, if the defendant does not have a proper understanding of what can happen as a result of his plea, it is not voluntarily made and is void.

Id. at 445-6.

In determining whether the defendant understood the consequences of entering a plea of guilty to a charge, courts often consider whether a defendant understood the minimum and maximum possible penalty and the potential for consecutive sentences if the defendant had been convicted of another crime. See e.g. Vasilacopolus, 756 P.2d at 95.

In State v. Copeland, No. 860491, slip op. (Utah December 6, 1988), the Utah Supreme Court vacated the defendant's sentence and remanded the case to the trial court in part for additional findings regarding the defendant's guilty plea. In Copeland, the defendant claimed that he misunderstood the basis of the State's sentencing recommendation. The Copeland court quoted the United States Supreme Court holding in Brady v. United States, 397 U.S. 742 (1970) at 13:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harrassment), misrepresentation

> (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes) (citations omitted) (emphasis in original).

The court then cited the decision of the Fourth Circuit Court of Appeals in Hammond v. United States, 528 F.2d 15 (4th Cir. 1975), and concluded "Brady and Hammond require that in order for a plea to be voluntarily and knowingly made, the defendant must understand the nature and value of any promises made to him." Copeland, slip op. at 14. Because the nature of the State's recommendation and the defendant's understanding regarding that recommendation were not clear, the court remanded the case with instructions that the defendant should be allowed to withdraw his plea under certain circumstances.

In the instant case, Mr. Velarde did not understand the consequences of his guilty plea and therefore the plea was not entered knowingly, intelligently and voluntarily. When Mr. Velarde entered the guilty plea, he understood that the conviction would have little impact on the time he spent in prison since he was already serving a sentence of five years to life for a second degree murder conviction. Believing that the sentence of zero to five years would not significantly affect the amount of time he spent in prison, Mr. Velarde pled guilty even though he had a defense to the charge.

When Mr. Velarde's murder conviction was reversed, the basis for entering the guilty plea to Attempted Mayhem was removed and Mr. Velarde's understanding of the consequences of his guilty

plea proved to be incorrect. Hence, Mr. Velarde's plea was not made knowingly, intelligently and voluntarily, in violation of the due process clause of the fourteenth amendment to the federal constitution and Rule 11(e), and the trial court abused its discretion in not permitting him to withdraw the plea.

Furthermore, the policy of the Board of Pardons changed so that Mr. Velarde's understanding of the consequences of entering his plea was erroneous (TA. 9-10).

B. THE GUILTY PLEA WAS TAKEN IN VIOLATION OF UTAH CODE ANN. §77-35-11(e) (1982 AND SUPP. 1986).

Where a plea was entered in violation of Utah Code Ann. §77-35-11(e) (1982 and Supp. 1986), good cause may exist for withdrawal of that plea. See State v. Gibbons, 740 P.2d 1309 (Utah 1987); Vasilacopolus, 756 P.2d at 95. Rule 11(e) outlines the procedure to be followed by a trial court in accepting a guilty plea. It provides:

> (e) The court . . . shall not accept such a [guilty] plea until the court has made the findings:
>
> (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
>
> (2) That the plea is voluntarily made;
>
> (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
>
> (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable

> doubt; and that the plea is an admission of all those elements;
>
> (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
>
> (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.
>
> If it appears that the prosecuting attorney or any other party has agreed to request or recommend the acceptance of a plea to a lesser included offense, or the dismissal of other charges, the same shall be approved by the court. If recommendations as to sentence are allowed by the court, the court shall advise the defendant personally that any recommendation as to sentence is not binding on the court.

In Warner v. Morris, 709 P.2d 309 (Utah 1985) and its companion case, Brooks v. Morris, 709 P.2d 310 (Utah 1985), the Utah Supreme Court reviewed the record as a whole to determine whether the trial court accepted the guilty pleas in violation of Rule 11(e). The test for determining whether the rule was violated was to consider whether the record as a whole "affirmatively establishes that the defendant entered his plea with full knowledge and understanding of its consequences and of the rights he was waiving . . ." Warner, 709 P.2d at 310; Brooks, 709 P.2d at 311. In both cases, the trial judge questioned the defendant to determine whether the plea was being made intelligently and voluntarily but failed to ask specifically whether the defendant waived his right against self-incrimination. In each case, the Court determined that the record as a whole established that the defendant understood the rights he was waiving and the consequences of his plea.

In State v. Miller, 718 P.2d 403 (Utah 1986), the Utah Supreme Court reaffirmed its holdings in Brooks and Warner that the record as a whole must be reviewed to determine whether the plea was taken in violation of Rule 11(e). Id. at 405.

In Gibbons, the Utah Supreme Court outlined "a statement of law concerning the taking of guilty pleas in all trial courts in this state . . ." Id. at 1312. The Court pointed out that "[r]ule 11(e) squarely places on trial courts the burden of ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." Id at 1312. The Court emphasized that trial judges cannot rely on defense counsel to ensure that a defendant understands the rights he is waiving and the consequences of entering a guilty plea but instead must review with the defendant any statement in an affidavit signed as part of the entry of the guilty plea, "question the defendant concerning his understanding of it, and fulfill the other requirements imposed by §77-35-11 on the record before accepting the guilty plea. If the Court does not use an affidavit, the requirement set forth above and in §77-35-11 must still be followed and be on the record." Id. at 1314.

1. The Gibbons Standard Applies to This Case and Requires Reversal of the Trial Court's Denial of the Defendant's Motion to Withdraw the Guilty Plea.

The trial judge seemed to deny the motion to withdraw in part based on his belief that Gibbons should not be applied retroactively to this case. (Transcript of Hearing held September 12, 1988 at 10.) (See Addendum A for transcript of

judge's ruling.) In Vasilacopolus, 756 P.2d at 94, this Court reached a similar conclusion, stating that "the strict Rule 11(e) compliance standard established under Gibbons in 1987 does not apply" to a case where the defendant entered his guilty plea prior to the Gibbons decision. Mr. Velarde respectfully requests that this Court reconsider its determination that Gibbons does not apply to guilty pleas entered prior to the date of the decision.[1]

Rule 11(e) was in effect and controlled the acceptance of guilty pleas at the time Mr. Velarde pled guilty to Attempted Mayhem. Warner, Brooks and Miller contained very short discussions of the rule. In Gibbons, the Supreme Court took the opportunity to outline at length "a statement of the law concerning the taking of guilty pleas in all trial courts . . ." Gibbons therefore explains and clarifies Rule 11(e).

The responsibility of the trial judge to discuss with the defendant on the record the details of his constitutional rights and to obtain a valid affirmative waiver thereof on the record did not arise with the Gibbons decision. In Boykin v. Alabama, 395 U.S. at 242, the United States Supreme Court stated:

> The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation.

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[1] The approach of the Utah Supreme Court when dealing with retroactivity issues is not clear. Although in Andrews v. Morris, 677 P.2d 81, 88-91 (Utah 1983) the Court embraced the "clear break" rule discussed in United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), the United States Supreme Court altered its position on retroactivity in Griffith v. Kentucky, 479 U.S. ___, 107 S.Ct. ___, 93 L.Ed.2d 649 (1987). Although Griffith is not controlling, it does provide guidance for the Utah Supreme Court on retroactivity issues.

Such a responsibility is also implicit in the language of Rule 11(e) and alluded to in Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976), which was decided well before the entry of the disputed guilty plea in this case.

Finally, in both Brooks and Warner, the trial judge carefully examined appellant to insure that the plea was intelligently and voluntarily entered (Brooks, 709 P.2d at 311) or conducted a question and answer session which "followed the litany required by Utah Rules of Criminal Procedure 11(e) . . ." Warner, 709 P.2d at 310. Hence, pursuant to Rule 11(e), as applicable at the time the trial court accepted the plea in Mr. Velarde's case and the due process clause of the federal constitution, the trial judge had a responsibility to examine Mr. Velarde on the record to determine whether he understood his constitutional rights and voluntarily waived them and could not rely on defense counsel to carry out that responsibility.

A review of Gibbons and the transcript of the hearing where the guilty plea was entered clarifies that the trial judge did not follow the dictates of Rule 11(e) in accepting Mr. Velarde's guilty plea and therefore good cause exists for allowing withdrawal of that plea. The Supreme Court clarified in Gibbons that a trial judge has the responsibility to discuss the specific rights being waived with the defendant on the record as well as the consequences of entering the plea and not rely on defense counsel to convey that information to a defendant. Gibbons, 740 P.2d at 1313.

In the present case, the trial judge did not question Mr. Velarde regarding his understanding of his rights and waiver thereof as required by Rule 11(e). Instead, he relied on defense counsel to explain to Mr. Velarde his constitutional rights and their waiver. The trial judge asked "[h]ave you gone over your constitutional rights and waiver thereof as set forth in your affidavit?" Transcript of plea hearing dated January 24, 1984 (hereinafter TP) at 2. Entire transcript of hearing is contained in Addendum B.

When the defendant answered affirmatively, the judge asked "[d]o you understand those rights you are waiving?" Id. Hence, the trial judge made no attempt to discuss Mr. Velarde's constitutional rights with him or his waiver thereof, in violation of Rule 11(e)(3).

Rule 11(e)(4) requires that the trial court make findings that "the defendant understands the nature and elements of the offense to which he is entering the plea." Gibbons clarifies that "the defendant must understand the elements of the crimes charged and the relationship of the law to the facts." Gibbons, 740 P.2d at 1312. In the instant case, the trial judge made no attempt to ascertain whether Mr. Velarde understood the elements of the charge of Attempted Mayhem nor the relationship to the facts. Instead, the trial judge repeated from the statements contained in the amended Information, then asked Mr. Velarde for a plea.

> The Court: All right. To the included offense of Attempted Mayhem, a third-degree felony as I have described it to you, which occurred at 73 East 400 South, in Salt lake County, State of Utah, on or

> about March 4, 1983, in violation of Title 76, Chapter 5, Section 105, Utah Code Annotated, 1953, as amended, in that you, Jerry Lee Velarde, attempted to commit mayhem upon Michael S. Terry by unlawfully and intentionally depriving Michael S. Terry of a member of his body, to wit: an ear, and/or by unlawfully and intentionally slitting the ear of Michael S. Terry, what now is your plea? Guilty or not guilty?

TP at 4. See Addendum B. Although the Court made a finding that the guilty plea was freely and voluntarily made and that Mr. Velarde was not under the influence of drugs or alcohol, or suffered from a mental disability at the time he entered his plea, he did not make a finding that Mr. Velarde understood the nature and elements of the charge.[2] Nor did the trial judge ascertain whether Mr. Velarde understood or make a finding that Mr. Velarde understood that the State had the burden of proving all elements beyond a reasonable doubt or the fact that the plea was an admission to all of the elements of Attempted Mayhem. Id. Hence, the trial judge accepted the plea in violation of Rule 11(e)(4).

Rule 11(e)(5) requires that the defendant know the possible sentencing consequences and that the trial judge make findings to that effect. No such findings were made in this case, and while the trial judge did inform Mr. Velarde that he could impose consecutive sentences, there was no discussion concerning the effect of a reversal of the murder conviction. As outlined in the

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[2] As discussed infra in subpoint 2 at 12, the affidavit Mr. Velarde signed does not outline the facts and therefore did not establish that Mr. Velarde understood the nature of the crime he was pleading to, the elements the State must prove, and the relationship of the facts in his case to that crime.

Statement of Facts at 1-2, Mr. Velarde entered his guilty plea to Attempted Mayhem believing it would have little impact on his sentence. Because the record does not establish that Mr. Velarde understood the full consequences of his plea, the trial court accepted the plea in violation of Rule 11(e).

Because the trial judge accepted the plea in violation of Rule 11(e), good cause for withdrawal of the guilty plea existed, and the trial judge abused his discretion in denying Mr. Velarde's motion to withdraw his plea.

2. The Warner-Brooks Test Requires Reversal of the Trial Judge's Denial of Mr. Velarde's Motion to Withdraw His Guilty Plea.

In Vasilacopulos, this Court reversed the trial court's denial of a defendant's motion to withdraw his guilty plea based on the trial court's failure to establish that the defendant understood the possibility of consecutive sentences. Id. at 94. This Court states that in Gibbons, the Utah Supreme Court outlined a standard which required stricter compliance with the provisions of Rule 11(e) than the standard which had been followed in Warner, Brooks and Miller. Because Vasilacopulos entered his plea on February 17, 1984, prior to the decision in Gibbons, this Court applied what it called the "Warner-Brooks test" and determined "whether the record as a whole affirmatively establishes defendant entered his plea with full knowledge and understanding of its consequences, namely the possibility of the imposition of consecutive sentences." Vasilacopulos, 756 P.2d at 94. When this Court reviewed the record

as a whole, it determined that the record "does not affirmatively establish defendant's full knowledge and understanding of the consequences of his plea under Rule 11(e)(5)." Id. at 95.

Mr. Velarde entered his plea on January 24, 1984, approximately three weeks before Mr. Vasilacopulos entered his pleas. In the event Gibbons is inapplicable to Mr. Velarde's case, the "Warner-Brooks" review of the record as a whole test is nevertheless applicable. Applying that test to the entry of Mr. Velarde's plea of guilty of Attempted Mayhem establishes that the trial judge violated Rule 11(e) and the due process clause of the fourteenth amendment in accepting Mr. Velarde's plea.

As outlined in subpoint 1, supra, the trial judge did not discuss with Mr. Velarde the constitutional rights he was waiving nor the nature and elements of the crime to which he was pleading guilty. A review of the affidavit signed by Mr. Velarde does little to remedy this deficit (see Addendum C).

Rule 11(e)(4) and due process require that a defendant understand the nature and elements of the offense to which he is pleading guilty and the relationship of the facts in the defendant's case to the law. As previously outlined, the trial judge did not discuss with Mr. Velarde the elements necessary to prove Attempted Mayhem nor the specific facts in his case supporting such a conviction. Instead, the judge read the amended Information (R. 10, TP. 4), then asked Mr. Velarde for a plea.

The affidavit does not establish that Mr. Velarde understood the elements required to prove Attempted Mayhem. In the

affidavit, under the "Elements" section, the following language was inserted:

> Def. (sic) attempted to unlawfully and intentionally deprive Michael S. Terry of a member of his body.

(R. 16). The elements as listed in the affidavit do not clarify what act by the defendant is necessary to establish Attempted Mayhem.

The lines in the affidavit where the facts should have been listed are blank (R. 16). Hence, the affidavit does not clarify what Mr. Velarde had done nor how those facts fit together in support of the charge.

Mayhem is a somewhat unusual crime that requires specific egregious injury to the victim. The average person may well not understand the differences among Assault, a Class B misdemeanor; Aggravated Assault, a third degree felony; Attempted Mayhem, a third degree felony; and Mayhem, a second degree felony. Both the due process clause and Rule 11(e) require that a defendant be fully informed as to what he did and how that fits within the elements of the crime to which he is pleading. In this instance, the record as a whole does not establish that Mr. Velarde understood the nature and elements of the crime of Attempted Mayhem nor the nature of his actions in relationship to that crime.

Nor does the record as a whole establish that Mr. Velarde understand the full consequences of his guilty plea. As previously outlined, the trial judge did not discuss the impact of a reversal of the murder conviction on Mr. Velarde's sentence nor does the affidavit clarify that point. Hence, the trial judge accepted the

plea in violation of Rule 11(e)(5).

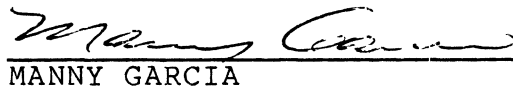
Nor does the record as a whole establish that the judge made the required findings under Rule 11(e)(3), (4) and (5), including the defendant's knowledge of the right outlined in Rule 11(e)(3), the defendant's understanding of the nature and elements of the crime to which he pled, and the State's burden of proof.

Because the trial court accepted the guilty plea in violation of Rule 11(e) and the due process clause of the fourteenth amendment, the trial judge abused his discretion in denying Mr. Velarde's motion to withdraw his guilty plea.

CONCLUSION

Mr. Velarde respectfully requests that this Court reverse the trial court's denial of his motion to withdraw his plea of guilty to Attempted Mayhem and remand the case for a new trial.

Respectfully submitted this 21 day of December, 1988.



MANNY GARCIA
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, MANNY GARCIA, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 230 South 500 East, Suite 300, Salt Lake City, Utah 84112 and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114 this 21 day of December, 1988.

MANNY GARCIA

DELIVERED by _____

this _____ day of December, 1988.

_____

ADDENDUM A

THAT HE INDEED ADMITTED TO CRIMINAL HOMICIDE, MANSLAUGHTER, AS HE HAS ADMITTED IN THIS CASE TO ATTEMPTED MAYHEM THAT HIS CHANGING STATE OF MIND COULD BRING HIM BEFORE THIS COURT, I DON'T KNOW. BUT, THE OPERATIVE EFFECT TO SAY GIBBONS IS RETROACTIVE WOULD ESSENTIALLY VOID ANY GUILTY PLEA ENTERED INTO FROM GIBBONS IN THE STATE COURTS OF UTAH, AND SAY THIS IS TOO GREAT A LEAP OF FAITH FOR THE COURT TO DO.

MR. GARCIA: AND SO I SUBMIT IT, JUDGE. I AM NOT TALKING ABOUT HIS CHANGE OF STATE OF MIND SO MUCH, BUT THE CHANGE OF CIRCUMSTANCES WHICH ARE ENORMOUS IN THIS CASE, AND FROM JERRY'S POINT OF VIEW, UNFORESEEABLE, FOR HE WAS NOT TOLD THAT THIS THING COULD BE THROWN INTO A BIG MESS IF THIS CASE IS REVERSED ON APPEAL AND GOES -- ENTER A PLEA, HAS NOTHING TO DO WITH GUILT OR INNOCENCE AT THAT TIME.

I SUPPOSE THE STATE WAS READY TO GO FORWARD AT THAT TIME, SO THEY SHOULD JUST -- WE'RE ASKING HE HAVE A TRIAL ON THAT CHARGE NOW BECAUSE THE REASON THAT HE ENTERED THE PLEA IS NO LONGER REAL.

THE COURT: I THOUGHT ABOUT THE RETROACTIVE -- ABOUT GIBBONS, BECAUSE IT WAS ABOUT FIVE YEARS AGO. HE ENTERED HIS PLEA -- GIBBONS IS 1987, JUNE, SO THAT'S LAST YEAR. REVIEWING YOUR ARGUMENTS AND CIRCUMSTANCES OF THIS CASE, THE COURT IS OF THE OPINION THAT THE MOTION SHOULD BE DENIED AT THIS TIME BASED ON STATE'S ARGUMENTS AND WITH REGARD TO RETROACTIVE AND THE CIRCUMSTANCES REGARDING THE ENTRY OF THE PLEA AT THE TIME.

ADDENDUM B

SALT LAKE CITY, UTAH; TUESDAY, JANUARY 24, 1984

9:30 A.M.

--00000--

THE COURT: JERRY LEE VELARDE?

MR. VALDEZ: THAT'S MY MATTER, YOUR HONOR. THAT IS SET FOR A CHANGE OF PLEA.

THE COURT: ALL RIGHT. WHAT IS THE ANTICIPATED PLEA?

MR. VALDEZ: PLEA TO A THIRD DEGREE, ATTEMPTED.

THE COURT: ATTEMPTED MAYHEM? THIRD DEGREE, ATTEMPED MAYHEM?

IS YOUR TRUE AND CORRECT NAME JERRY LEE VELARDE?

MR. VELARDE: YES, SIR.

THE COURT: HAVE YOU GONE OVER YOUR CONSTITUTIONAL RIGHTS AND THE WAIVER THEREOF AS SET FORTH IN YOUR AFFIDAVIT?

MR. VELARDE: YES, SIR.

THE COURT: DO YOU UNDERSTAND THOSE RIGHTS THAT YOU ARE WAIVING?

MR. VELARDE: YES, SIR.

THE COURT: ANY QUESTIONS YOU WOULD CARE TO ASK THE COURT WITH REFERENCE TO YOUR CONSTITUTIONAL RIGHTS OR THE WAIVER THEREOF?

MR. VELARDE: NO, SIR.

THE COURT: HAS THERE BEEN ANY PROMISES MADE TO YOU TO GET YOU TO ENTER A PLEA?

MR. VELARDE: NO, SIR.

THE COURT: HAS THERE BEEN ANY PROMISES MADE AS TO WHAT THE COURT WOULD DO ON SENTENCING IN THIS CASE?

MR. VELARDE: NO, SIR.

THE COURT: HAS THERE BEEN ANY THREATS, DURESS OR ANY OTHER UNDUE INFLUENCE EXERTED ON YOU TO GET YOU TO ENTER A PLEA?

MR. VELARDE: NO, SIR.

THE COURT: BY ENTERING A PLEA TO THE INCLUDED OFFENSE, THAT CARRIES OF SENTENCE OF ZERO TO FIVE YEARS IN THE UTAH STATE PENITENTIARY AND/OR A FINE NOT TO EXCEED $5,000. BY ENTERING A PLEA OF GUILTY, YOU DO, IN FACT, ADMIT THE ACTS THAT SUPPORT THAT CHARGE.

HOW OLD ARE YOU?

MR. VELARDE: 28, SIR.

THE COURT: DO YOU READ AND WRITE THE ENGLISH LANGUAGE?

MR. VELARDE: YES.

THE COURT: HAVE HIM EXECUTE THE AFFIDAVIT.

ARE YOU PRESENTLY UNDER THE INFLUENCE OF ANY DRUGS, NARCOTICS OR ALCOHOLIC BEVERAGES?

MR. VELARDE: NO, SIR.

THE COURT: DO YOU FEEL YOU HAVE ANY PHYSICAL OR

MENTAL DISABILITY AS SUCH THAT INTERFERES WITH YOUR FREE CHOICE TO ENTER SUCH A PLEA?

MR. VELARDE: NO, SIR.

THE COURT: ARE YOU FREELY AND VOLUNTARILY ENTERING A PLEA OF GUILTY AT THIS TIME?

MR. VELARDE: YES.

THE COURT: ALL RIGHT. TO THE INCLUDED OFFENSE OF ATTEMPTED MAYHEM, A THIRD-DEGREE FELONY AS I HAVE DESCRIBED IT TO YOU, WHICH OCCURRED AT 73 EAST 400 SOUTH, IN SALT LAKE COUNTY, STATE OF UTAH, ON OR ABOUT MARCH 4, 1983, IN VIOLATION OF TITLE 76, CHAPTER 5, SECTION 105, UTAH CODE ANNOTATED, 1953, AS AMENDED, IN THAT YOU, JERRY LEE VELARDE, ATTEMPTED TO COMMIT MAYHEM UPON MICHAEL S. TERRY BY UNLAWFULLY AND INTENTIONALLY DEPRIVING MICHAEL S. TERRY OF A MEMBER OF HIS BODY, TO WIT: AN EAR, AND/OR BY UNLAWFULLY AND INTENTIONALLY SLITTING THE EAR OF MICHAEL S. TERRY; WHAT NOW IS YOUR PLEA? GUILTY OR NOT GUILTY?

MR. VELARDE: GUILTY.

THE COURT: PLEA OF GUILTY IS RECEIVED, AND THE COURT FINDS THAT IT WAS FREELY AND VOLUNTARILY MADE BY THE DEFENDANT, THAT HE IS NOT PRESENTLY UNDER THE INFLUENCE OF ANY DRUGS, NARCOTICS OR ALCOHOLIC BEVERAGES, NOR HAS A PHYSICAL OR MENTAL DISABILITY AS SUCH THAT INTERFERES WITH HIS FREE CHOICE TO ENTER SUCH A PLEA.

I BASE THOSE FINDINGS ON MY OBSERVATIONS OF THE

DEFENDANT HERE IN THE COURTROOM, TOGETHER WITH THE QUESTIONS THAT WERE PUT TO HIM AND HIS RESPONSES THERETO.

YOU HAVE A RIGHT TO BE SENTENCED IN NOT LESS THAN TWO NOR MORE THAN 30 DAYS. WHAT IS YOUR PREFERENCE?

MR. VALDEZ: WE WOULD WAIVE THE MINIMUM TIME, YOUR HONOR, AND ASK YOU SENTENCE HIM TODAY.

THE COURT: YOU UNDERSTAND, BY BEING SENTENCED TODAY, I WOULD COMMIT YOU TO THE PENITENTIARY?

MR. VELARDE: YES, SIR.

THE COURT: IT IS THE JUDGMENT OF THE COURT THAT YOU BE SENTENCED TO -- ARE YOU OUT AT THE PENITENTIARY NOW?

MR. VELARDE: YES, I AM.

THE COURT: I NEGLECTED TO TELL YOU, THEN -- I WASN'T AWARE OF THAT -- I CAN ALLOW THAT TO RUN CONSECUTIVELY OR CONCURRENTLY WITH THE SENTENCE YOU ARE PRESENTLY SERVING OUT THERE.

DO YOU UNDERSTAND THAT?

MR. VELARDE: YES.

THE COURT: WHAT ARE YOU SERVING OUT THERE?

MR. VELARDE: FIVE TO LIFE.

THE COURT: IT WILL RUN CONCURRENTLY. I WILL SENTENCE YOU TO ZERO TO FIVE YEARS IN THE UTAH STATE PENITENTIARY. COMMITMENT WILL ISSUE FORTHWITH, AND I WILL ALLOW IT TO RUN CONCURRENTLY WITH THE FIVE TO LIFE SENTENCE YOU ARE PRESENTLY SERVING.

MR. VALDEZ: THANK YOU.

ADDENDUM C

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

In the District Court of the Third Judicial District
State of Utah

JAN 2 4 1984

H. Dixon Hindley, Clerk 3rd Dist Court
By Patricia Deputy Clerk

THE STATE OF UTAH,
Plaintiff

vs.

Jerry Lee Velarde
Defendant

Affidavit of Defendant

Criminal No. CR 83-1219

I, Jerry Lee Velarde, under oath, hereby acknowledge that I have entered a plea of guilty to the charge(s) of: Attempted Mayhem
(Name of Crime)

Elements: Facts:

Def. attempted to unlawfully and intentionally deprive Michael S. Terry of a member of his body

I have received a copy of the charge (Information) and understand the crime I am pleading guilty to is a Third Degree Felony
(Degree of Felony or Class of Misdemeanor)

and understand the punishment for this crime may be Zero to Five prison term, 5,000 fine, or both. I am not on drugs or alcohol. My plea of guilty is freely and voluntarily made. I am represented by Attorney James A. Valde who has explained my rights to me and I understand them.

1. I know that I have a constitutional right to plead not guilty and to have a jury trial upon the charge to which I have entered a plea of guilty, or to a trial by a judge should I desire.

2. I know that if I wish to have a trial, I have a right to see and hear the witnesses against me in open court in my presence and before the Judge and jury with the right to have those witnesses cross examined by my attorney. I also know that I have a right to have my witnesses subpoenaed at state expense to testify in court upon my behalf and that I could testify on my own behalf, and that if I choose not to do so, the jury will be told that this may not be held against me.

3. I know that if I were to have a trial that the prosecutor must prove each and every element of the crime charged beyond a reasonable doubt, that any verdict rendered by a jury whether it be that of guilty or not guilty must be by a complete agreement of all jurors.

4. I know that under the constitution that I have a right not to give evidence against myself and that this means that I cannot be compelled to admit that I have committed any crime and cannot be compelled to testify unless I choose to do so.

5. I know that under the constitution of Utah that if I were tried and convicted by a jury or by the Judge that I would have a right to appeal my conviction and sentence to the Supreme Court of Utah for review of the trial proceedings and that if I could not afford to pay the costs for such appeal, that those costs would be paid by the State without cost to me.

6. I know and understand that by entering a plea of guilty I am giving up my constitutional rights as set out in the preceeding paragraphs and that I am admitting I am guilty of the crime to which my plea of guilty is entered.

7. I also know that if I am on probation, parole, or awaiting sentencing upon another offense of which I have been convicted or to which I have plead guilty, my plea in the present action may result in consecutive sentences being imposed on me.